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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

3 STATE OF NEW YORK, et al.,

4 Plaintiffs,

5 v.

18 Civ. 2921 (JMF)

6 UNITED STATES DEPARTMENT OF  
7 COMMERCE, et al.,

Conference

8 Defendants.

9 -----x  
10 New York, N.Y.  
11 May 9, 2018  
12 3:05 p.m.

12 Before:

13 HON. JESSE M. FURMAN,

14 District Judge

15 APPEARANCES

16 NEW YORK STATE OFFICE OF THE ATTORNEY GENERAL  
Attorneys for Plaintiffs

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18 - and -

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APPEARANCES (Cont'd)

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Civil Division, Federal Programs Branch  
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BY: BRETT SHUMATE  
KATE BAILEY  
CAROL FEDERIGHI

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(Case called)

MR. COLANGELO: Good afternoon. Matthew Colangelo, for the state of New York. I have three cocounsel at plaintiffs' table who will introduce themselves. I wanted to thank the Court as well for setting up the conference line so that other counsel could attend by telephone.

MS. GOLDSTEIN: Elena Goldstein, also for the plaintiffs.

MR. SAINI: Ajay Saini, also for plaintiffs.

MR. RIOS: Rolando Rios, for Cameron and Hidalgo County. El Paso couldn't be here, your Honor, but they are on the phone.

THE COURT: All right. Welcome.

MS. TARCZYNSKA: Good afternoon. Dominika Tarczynska, from the United States Attorney's Office, on behalf of the defendants. With me at counsel table from the Department of Justice Civil Division are Deputy Assistant Attorney General Brett Shumate, Kate Bailey, and Carol Federighi.

THE COURT: All right. Good afternoon to all of you.

I understand we are up and running on CourtCall. So I assume other counsel are listening in, but don't see any reason to take their appearances.

I would ask that everybody, the acoustics in here can be a little challenging, because of that and because folks are listening in by phone, just make sure you speak loudly,

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1 clearly, and most importantly, into the microphones. And then  
2 hopefully everyone will be able to hear.

3 All right. We're here for the initial conference in  
4 this matter. I did get the joint letter of May 3 with  
5 plaintiffs' proposed case management plan attached. We'll get  
6 there in one moment, but a few housekeeping preliminary  
7 matters.

8 I have the sense that the New York Attorney General is  
9 taking the lead on this. I don't know. There are, obviously,  
10 a number of plaintiffs. Is there a need to formally appoint  
11 lead counsel? Have you guys sort of informally sorted that  
12 out? What's the status there?

13 MR. COLANGELO: Yes, your Honor. We've agreed that  
14 the New York Attorney General's Office will lead.

15 THE COURT: All right. Very good. The second  
16 question is I gather this is not the only case with respect to  
17 the census generally and the citizenship question specifically.  
18 Can somebody fill me in? I think there's one in California. I  
19 know there's a lawsuit in Maryland, although I think it doesn't  
20 pertain to the citizenship question, if I'm not mistaken.

21 Is that correct, are there others that I didn't just  
22 mention? What's the status of those? How do they intersect  
23 with this case, and so forth?

24 MR. COLANGELO: Your Honor, if I may, the United  
25 States may have different or better information on the status

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1 of those cases, but in addition to this action in your court,  
2 there are three other pending challenges as of now to the  
3 Commerce Department's decision to demand citizenship  
4 information on the 2020 census.

5 The state of California has filed an action in the  
6 Northern District. They've recently amended the complaint to  
7 add parties, and that case is in front of Judge Seeborg.  
8 There's a separate action also filed in the Northern District  
9 of California. The plaintiffs include the city of San Jose and  
10 a number of other parties. That is currently in front of a  
11 different judge, also in the Northern District of California.  
12 As I understand it, a motion to consolidate those cases -- to  
13 assign them as related cases, I should say, is pending.

14 And then there is a fourth case that is pending in the  
15 District of Maryland, that's the Kravitz action, filed on  
16 behalf of a number of individual residents of a number of  
17 different states, including Florida, Maryland, Arizona, and  
18 Nevada. That case has been assigned to Judge Hazel in the DMD.

19 There's a separate challenge to the census that is  
20 also pending in front of the District of Maryland filed by the  
21 NAACP, but that challenge does not include any arguments  
22 regarding the addition of the citizenship question. I should  
23 defer to the United States on any information they have on the  
24 status of any case management conferences in those actions.

25 THE COURT: All right.

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1 MS. TARCZYNSKA: Your Honor, that is my understanding  
2 of the pending actions. The counsel who are handling those  
3 cases from the Civil Division Federal Programs Branch are here,  
4 so they may have something to add in terms of the status. I'll  
5 turn it over to them.

6 Is there anything to add?

7 MS. BAILEY: Your Honor, that was an accurate list of  
8 the cases that are currently pending.

9 THE COURT: All right. Where do they stand in terms  
10 of have any of them been conferenced? Are any of them further  
11 along than this? Is the administrative record being prepared  
12 sooner in connection with any of those cases? What impact do  
13 those cases have here, if any?

14 MS. BAILEY: None of those cases have proceeded faster  
15 than this case, your Honor. The administrative record is being  
16 prepared for all of the cases. There are status conferences or  
17 initial conferences scheduled in those cases, but not until  
18 further out in June. So there have not been any filings or  
19 relevant hearings in those cases.

20 THE COURT: All right.

21 MS. BAILEY: Except for the noncitizenship case had a  
22 hearing yesterday on an initial letter filed by plaintiffs, not  
23 related to this case.

24 THE COURT: That's the NAACP case?

25 MS. BAILEY: Yes, your Honor.

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1 THE COURT: I assume that -- well, maybe I shouldn't  
2 assume, but there's no application to join any of these or for  
3 me to coordinate with any of the judges. Obviously, there may  
4 be consistent rulings, inconsistent rulings, but that's just  
5 the nature of the beast, I take it. Or does anyone have a  
6 different view on that?

7 MS. BAILEY: That is our understanding, your Honor, is  
8 that there's nothing at this time.

9 THE COURT: All right.

10 MR. COLANGELO: We don't have a different view, your  
11 Honor.

12 THE COURT: All right. Very good. Thank you on that.

13 So the big question here, obviously, I would like to  
14 set a schedule and figure out how to proceed. It seems like  
15 the big issue or dispute is whether and to what extent to  
16 proceed with discovery. I did get a sense of your arguments  
17 from the joint letter. Let me give you my immediate reactions  
18 and then give you an opportunity to be heard further.

19 Based on the allegations in the complaint, it does  
20 strike me that there is a colorable basis for some discovery in  
21 this case, perhaps a more colorable basis than in other APA  
22 actions, but my inclination is to think or say that that  
23 decision should be deferred until the administrative record is  
24 actually filed, that is to say, put together. There's law for  
25 the proposition that the agency is supposed to be granted

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1 deference even in connection with the presentation or  
2 compilation of the record, but bottom line is I think it's hard  
3 to evaluate whether the record is satisfactory, what is or  
4 isn't in the record, until we have the record.

5 So in that regard, my inclination is to think it's  
6 premature and that we should await the actual record before  
7 adjudicating and litigating the question of whether discovery  
8 outside of the record is appropriate here.

9 Having said that, I'm concerned about the timetable.  
10 I think everybody's in agreement that there's some urgency  
11 here, which is why I scheduled this conference a little bit  
12 earlier than I might have otherwise, sort of having an  
13 understanding and sense that there might be some time  
14 sensitivity. I also recognize that whatever I decide on this  
15 case, whatever my counterparts in these other districts decide,  
16 in all likelihood, I am not the final word here, and I want to  
17 leave enough time for you to seek appropriate review from  
18 higher authorities, all of which is to say I do think that  
19 there is some urgency to move this forward.

20 Before I give you some further thoughts on how that  
21 might be done, let me just ask the plaintiffs to articulate, if  
22 you were to be granted discovery, do you have a sense at this  
23 point of what it would entail, or is that something that we're  
24 better off deferring until the record is before us?

25 MR. COLANGELO: Thank you, Judge.

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1 I think there's a narrow category of discovery that we  
2 think could be begun now, even before seeing the administrative  
3 record. In APA record review cases, it's not uncommon to allow  
4 discovery outside the record where there are colorable  
5 allegations of improper motive or bad faith. We think that  
6 there are strong arguments on that ground here. And in the  
7 *Tummino* case, which we cited in the joint letter -- this is the  
8 Eastern District challenge to the FDA's refusal to act on an  
9 application for approval of the Plan B over-the-counter  
10 contraceptive medication -- in the *Tummino* case, the Court  
11 authorized discovery regarding the mental processes and  
12 decisional process of administrative decision-makers. We think  
13 the same factors that arose in the *Tummino* case have analogues  
14 here and would warrant discovery of agency decision-makers in  
15 this challenge.

16 And although in general there's nothing objectionable  
17 about the idea of waiting until we see the administrative  
18 record to decide whether we need more evidence, I think it's  
19 fair to say that we won't get an exploration of the  
20 decision-makers' mental state in the paper record that is  
21 produced.

22 So we think that discovery that is prefatory to and  
23 that includes deposition discovery regarding the  
24 decision-makers' process is appropriate to begin sooner rather  
25 than later, including before the record is produced.

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1           In the alternative, we do think there is a strong  
2 basis for advancing the deadline to produce the administrative  
3 record earlier than the June 8 deadline that the United States  
4 has proposed.

5           THE COURT: When you say "exploring the mental  
6 processes of the decision-makers," are we talking in  
7 deposition? interrogatories? How many decision-makers are you  
8 talking about?

9           MR. COLANGELO: I think we would want interrogatories  
10 to identify the right group, but I think, beyond that, I don't  
11 imagine this would be discovery beyond more than three or four  
12 individuals. So a small number of depositions, your Honor.

13          THE COURT: Presumably, that group would be  
14 identifiable from the record as well, which would obviate the  
15 need for interrogatories if we were to wait. Is that --

16          MR. COLANGELO: Well, without seeing the record, we  
17 can't answer that question, but it's likely that many of the  
18 relevant decision-makers would be identified in the record,  
19 perhaps not all.

20          THE COURT: All right. Defense counsel, anything you  
21 want to say on that beyond what you've already said in the  
22 letter?

23          MS. TARCZYNSKA: Your Honor, we believe that it is  
24 premature to make any ruling on whether discovery is  
25 appropriate or necessary until the administrative record has

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1 been produced. Although there is a narrow category of APA  
2 cases in which extra-record evidence may be appropriate, that  
3 is the exception and not the rule, and the plaintiffs need to  
4 make a strong showing in support of their claim of bad faith or  
5 improper behavior. Mere allegations are not sufficient. That  
6 is set forth even in the cases they themselves cite.

7 We believe they have not made that showing. An  
8 argument that the agency -- the Court may disagree with the  
9 agency on the merits or even that there was some sort of error,  
10 procedural or substantive, by the decision-maker. That's not  
11 the type of bad faith that establishes an entitlement to  
12 discovery. It needs to be something more, and the cases make  
13 clear that the burden is on the plaintiffs to make that  
14 showing. We believe that the allegations in their complaint  
15 are insufficient to make such a showing.

16 THE COURT: Because they're merely allegations or  
17 because, even assuming them to be true, they're not sufficient?

18 MS. TARCZYNSKA: Both, your Honor. They are merely  
19 allegations, and there's no evidence to support them. The only  
20 thing that they have pointed to are two emails sent by the  
21 president's reelection campaign several days before the  
22 decision is announced. They have pointed to nothing -- I have  
23 not seen those emails. It is merely referenced, I believe, in  
24 an article that they cite in their complaint. But they offer  
25 nothing to support the inference that these isolated

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1 communications from the political campaign had any impact on  
2 the secretary's decision. And until they have seen the record,  
3 we believe that that decision is inappropriate to make with  
4 respect to discovery.

5 THE COURT: I think, as I understand it, it's  
6 paragraphs 93 to 102, or thereabouts, and it's the conjunction  
7 of the argument that the stated rationale is essentially not  
8 believable and therefore it's pretextual, combined with the  
9 communications that you referenced in paragraph 101, one of  
10 which is quite explicit that the president "officially  
11 mandated" that the citizenship question be added.

12 How much more concrete evidence could they produce in  
13 order to get beyond the administrative record?

14 MS. TARCZYNSKA: Well, there's no evidence that that  
15 email, that email sent by the reelection campaign, had any  
16 impact on the secretary's decision. The fact that the -- I  
17 cannot speculate how that email came about, but --

18 THE COURT: Right, but we're talking about some  
19 demonstrable basis, some *prima facie* basis, to proceed beyond  
20 the record. And, again, it may be premature because the record  
21 hasn't been produced, and for all we know, there will be  
22 communications concerning what the president did or didn't do  
23 in the administrative record. But assuming for the moment that  
24 there isn't, you have a statement from the president's own  
25 reelection campaign saying that he officially mandated that

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1 this question be added and then agency action consistent with  
2 that official mandate. Does that not entitle them to go beyond  
3 the administrative record and to figure out what, if any,  
4 communications were made and what impact that had on the  
5 decision? It's hard for me to imagine a scenario in which  
6 there's a better basis to imagine that there might be things  
7 beyond the record than that.

8 MS. TARCZYNSKA: Your Honor, I think what's necessary  
9 would be the link to show that that communication -- that there  
10 was, in fact, a mandate from the president that impacted the  
11 secretary.

12 THE COURT: Surely the communication from the  
13 president's campaign -- and I'll assume for the moment that  
14 that is an accurate description of the communication -- is  
15 attributable to the president or at least agents of the  
16 president. Is that a fair assumption?

17 Then you have the communication that he officially  
18 directed it and the action consistent with that direction.  
19 That's a pretty good circumstantial case. Now, it may not be  
20 borne out by discovery, which is the point of discovery, but  
21 the question on my plate is whether to authorize that  
22 discovery.

23 MS. TARCZYNSKA: Your Honor, our position is there's  
24 no evidence that that communication impacted the secretary, who  
25 was the decision-maker. The decision-maker in this case was

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1 not the president; it was the secretary. What's relevant in  
2 evaluating his decision-making are the documents and materials  
3 that were before him, directly or indirectly.

4 THE COURT: All right. What's the harm in authorizing  
5 limited discovery to probe the mental processes of the agency  
6 decision-makers? I don't know if that includes the secretary  
7 or not. But to the extent that that would ultimately be the  
8 issue, counsel made the argument that whatever is in the  
9 record, the record isn't going to reveal what the internal  
10 mental processes were.

11 MS. TARCZYNSKA: Your Honor, the scope of the review  
12 under the APA, as is set forth in the APA, is the record before  
13 the agency. And the evaluation of that record is based on --  
14 the review standard is whether that decision was arbitrary and  
15 capricious, whether it was unsupported by the record. It is  
16 not a *de novo* review of the agency's decision. And to the  
17 extent that the record does not support the decision, the Court  
18 could rule based on the record before it and make a ruling and  
19 remand back to the agency.

20 This is a very standard APA case where a distinct  
21 agency decision is being challenged, and the mandate of the APA  
22 is that it is decided based on the -- that it is decided based  
23 on the record before the agency; that there isn't a look-behind  
24 to the thinking processes of the decision-makers.

25 THE COURT: Is it your view -- I'm sure that you're

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1 not going to agree with the following statement of the facts,  
2 but I'm going to ask you to assume as a hypothetical -- is it  
3 your view that if the stated rationale of the secretary was  
4 not, in fact, the rationale, that that is a pretextual  
5 rationale and that the real rationale is not consistent with  
6 that as either a put up one or something else, that that would  
7 not be a basis to reverse the decision and grant relief?

8 MR. SHUMATE: Your Honor, I'd be happy to answer that  
9 question. I'm Brett Shumate from the Civil Division.

10 I think we would agree if the plaintiffs on APA review  
11 can establish that the stated rationale is pretextual, that  
12 would be a basis for the Court to remand to the agency. But as  
13 a threshold matter, when we're deciding whether to authorize  
14 discovery, we think that it's premature to prejudge that  
15 question. That's really the merits question.

16 THE COURT: All right. I'm not prejudging the  
17 question. The question is just what record is needed to decide  
18 that question. So it really is a threshold question concerning  
19 discovery.

20 MR. SHUMATE: Sure, your Honor. And our position is  
21 that the decision-maker here was Secretary Ross, and it is his  
22 obligation to prove to the Court that he made a decision that  
23 was based on an adequate record. So whether or not the  
24 president had any involvement in that decision or not is really  
25 irrelevant to the question. The Court has to decide whether

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1 his decision, Secretary Ross' decision, was arbitrary and  
2 capricious or not. And the fact that the president's  
3 reelection campaign may have sent out an email taking credit  
4 for what his administration did I don't think in any way goes  
5 to the question of pretext.

6 I think your Honor hit the nail on the head at the  
7 beginning to allow the government to produce the administrative  
8 record. If the plaintiffs believe that is inadequate, they can  
9 file a motion to supplement the record or to expand the record.  
10 But, really, at this point there's no basis to probe the mental  
11 processes of the decision-maker. We have case law from the  
12 Supreme Court, the *Morgan* case, for example, that says we don't  
13 probe the mental processes of the decision-maker. The only  
14 role of the court is to evaluate whether the agency gave a  
15 rational explanation under the APA.

16 So we think the course the government has proposed is  
17 really appropriate here.

18 THE COURT: That argument seems a little bit in  
19 tension with the opening concession, which is that if I were to  
20 conclude the rationale, the stated rationale, were pretextual,  
21 then that would be a basis for granting relief. If you grant  
22 that, and I think one has to grant that, and there is a  
23 colorable *prima facie* basis to believe that it might be  
24 pretextual, I would think that that might entitle the  
25 plaintiffs to go beyond the record.

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1 But having said that, I am inclined to think that we  
2 should wait until the record is produced and then have a more  
3 concrete discussion about what's in the record, what's not in  
4 the record, what plaintiffs need, and so forth.

5 That gives rise to two thoughts, and I'm thinking a  
6 little bit out loud here, but let me get your reactions to  
7 this.

8 One is plaintiffs have suggested that the  
9 administrative record could be and should be filed sooner than  
10 June 8 and cite, in support of that, a letter. It's from  
11 members of Congress and restates representations, I guess, or  
12 suggests that the defendant had represented that they  
13 anticipated the record could be and would be prepared by  
14 Memorial Day, which is a couple weeks earlier than the June 8  
15 deadline. So that's one possibility.

16 The second possibility is it strikes me that one way  
17 of moving this forward and making the most use of our time is  
18 to stagger the motion practice that defendants indicate that  
19 they anticipate and plan on bringing. In the letter, the  
20 defendants articulate four bases for moving to dismiss or for  
21 summary judgment:

22 First, that the plaintiffs lack standing;

23 Second, that there is a lack of jurisdiction over the  
24 APA claim because the secretary's decision is committed to  
25 agency discretion by law;

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1 Third, that the Enumeration Clause of the Constitution  
2 mandates only an actual enumeration and does not essentially  
3 speak to the form of the questionnaire itself; and

4 Fourth, that even if the decision is reviewable, it's  
5 not arbitrary and capricious or otherwise contrary to law.

6 It strikes me that the first two of those arguments,  
7 at a minimum, and maybe even the third but certainly the first  
8 two, are pure issues of law and could be briefed even without  
9 the record being filed, which leads -- one of them, in  
10 particular, is a threshold -- maybe both of them are threshold  
11 arguments that I think I would need to address in the first  
12 instance regardless.

13 I guess the second thought out loud is maybe it's  
14 appropriate to split the briefing, stagger the briefing, and  
15 have defendants make a 12(b)(1) and/or 12(b)(6) motion sooner  
16 than the filing of the administrative record and then allow  
17 them to file a motion for summary judgment in connection with  
18 the record whenever it's filed.

19 Thoughts.

20 MR. COLANGELO: So, Judge, we're not at all opposed to  
21 the proposal to stagger the briefing, and we largely agree with  
22 how you characterize the defenses that the United States set  
23 out. I think I'd have a couple of suggestions in the  
24 alternative to what you proposed.

25 We agree that it's fair to say that the first two

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1 grounds for defense the United States outlined are proper bases  
2 of a 12(b)(1) motion.

3 THE COURT: You've got to slow down a little bit to  
4 make sure the court reporter can keep up.

5 MR. COLANGELO: Thank you, your Honor.

6 We agree that the first two grounds identified in the  
7 joint letter are the proper and most likely the proper subjects  
8 of a 12(b)(1) motion, and we agree that those can likely be  
9 briefed without the administrative record.

10 We think the third and fourth are, especially because  
11 the United States has characterized those as being potentially  
12 the subject of motions to dismiss or, in the alternative, for  
13 summary judgment. And in particular, in connection with the  
14 third basis, the third stated defense, they refer specifically  
15 to what the secretary makes clear in his decision. So we would  
16 propose disaggregating one and two from three and four.

17 The separate request that the plaintiffs would make is  
18 that we don't know how big the administrative record is going  
19 to be, and as the discussion that we've just had illustrates,  
20 the plaintiffs at least believe there are going to be strong  
21 grounds for going outside the administrative record, whether on  
22 fact discovery or on expert discovery, which we haven't  
23 discussed yet. And what I think would be worth avoiding, in  
24 the interest of efficiency for the parties and for the Court,  
25 is getting an extensive administrative record and a motion for

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1 summary judgment with a short response time without also  
2 building in time to confer with counsel and bring any issues to  
3 the Court regarding where and how to expand that record.

4 So what we would propose is briefing on the first two  
5 stated grounds for defense; production of the administrative  
6 record; and then after a reasonable period to resolve this  
7 question of whether and how to expand that record, then to have  
8 summary judgment briefing on grounds three and four.

9 THE COURT: I didn't mean to suggest -- or I think my  
10 suggestion wasn't meant to be inconsistent with that. I guess  
11 I was contemplating that the defendants would file a motion for  
12 summary judgment in conjunction with the administrative record  
13 on the theory that you might take the view that expansion of  
14 the record might be needed and propose either a period of time  
15 for you to meet and confer after the filing of the record on  
16 that question, followed by either a deadline for you to file a  
17 motion to expand the record, or to simply schedule a conference  
18 to have you back to discuss this issue further.

19 But all of which is to say I was contemplating that  
20 the defendant would file a motion for summary judgment, but we  
21 would still have that conversation. But maybe, again thinking  
22 out loud, maybe you're right, and maybe it makes sense to defer  
23 the summary judgment motion deadline until after that  
24 discussion as well. I'm just concerned, again, by the fact  
25 that time is a little bit of the essence here and definitely

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1 want to make the most of our time.

2 Now, let me hear from defense counsel.

3 MS. TARCZYNSKA: Your Honor, the reason we proposed  
4 aggregating the briefing all together on June 8 was to help  
5 expedite this case, but we would certainly be prepared to make  
6 the motion to dismiss arguments one through three of the ones  
7 that you -- that are articulated in our letter because we  
8 believe that those are questions of law that can be decided  
9 without the administrative record.

10 THE COURT: Two questions: One is point three, is  
11 that indeed a question of law? It makes reference to the  
12 secretary's decision and what he says in connection with his  
13 decision, which presumably is outside the confines of the  
14 complaint, although maybe it's incorporated by reference into  
15 the complaint and therefore cognizable under 12(b)(6).

16 MS. TARCZYNSKA: Your Honor, the third question turns  
17 on what the Enumeration Clause requires, and the Enumeration  
18 Clause requires only that an actual enumeration be conducted,  
19 without any specific forms -- restrictions as to the form of  
20 the census questionnaire. And so that is the legal issue that  
21 we would be briefing, whether that is indeed the appropriate --  
22 if that is the case, then there is no action to evaluate the  
23 questions under the Enumeration Clause.

24 THE COURT: All right. Then the next question is if  
25 we did it that way and essentially you had a deadline to file a

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1 motion under 12(b)(1) and 12(b)(6), how soon could you file  
2 that motion? Or let me put it differently. Could you file it  
3 by May 25, two weeks from tomorrow -- from Friday?

4 MS. TARCZYNSKA: Can I confer with my team?

5 THE COURT: Yes.

6 (Counsel conferred)

7 MS. TARCZYNSKA: That is possible. We could do that.  
8 The preference -- provided that we're not also producing the  
9 administrative record at the same time.

10 The preference is, as I understand it, to address all  
11 four arguments at the same time along with the administrative  
12 record, which we would not be prepared to do in the next two  
13 weeks. But delaying that briefing even until June 8 and  
14 getting everything in at once, including the administrative  
15 record, would, we believe, lead to a more expeditious  
16 resolution.

17 But, yes, we would be -- if that's what the Court  
18 desires, we can do the first three arguments in the next two  
19 weeks.

20 THE COURT: I missed what you said about as long as we  
21 don't something with respect to the administrative record.

22 MS. TARCZYNSKA: As long as we aren't also required to  
23 produce the administrative record on that date. So the  
24 administrative record --

25 THE COURT: You would still be prepared to produce by

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1 June 8, though?

2 MS. TARCZYNSKA: Yes, but no discovery with respect to  
3 any -- the resolution of the issues regarding discovery should  
4 occur after June 8.

5 THE COURT: All right. Here's what I would propose.  
6 Let me throw it out, and then you can tell me your thoughts.

7 I would propose that defendants file a motion under  
8 12(b)(1) and 12(b)(6), certainly with respect to the first two  
9 issues, and if you think that it can be decided under those  
10 rules with respect to the third issue as well by May 25, with  
11 opposition due by June 8, and reply by June 15.

12 Then I would propose that we schedule oral argument  
13 for a week or two thereafter. And at the same time, on the  
14 theory that the administrative record will have been prepared  
15 and filed by June 8, between that date and oral argument, you  
16 can meet and confer with respect to the contents of the record  
17 and figure out your respective positions on whether additional  
18 discovery is warranted and file something in advance of oral  
19 argument. And at that oral argument, we would address that  
20 issue as well, discuss.

21 MR. COLANGELO: Your Honor, we're comfortable with  
22 that with one request. Given the nature of the defenses that  
23 the United States is proposing, given that these are important  
24 constitutional claims on a significant issue, we think 14 days  
25 may not be sufficient time to respond, and we would ask for 21

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1 days in the alternative. Just push your proposal back by a  
2 week while leaving the record production date no later than  
3 June 8.

4 THE COURT: All right. I'm trying to move things  
5 forward.

6 MR. COLANGELO: I appreciate that. We share that  
7 interest but don't want to be prejudiced in the meantime.

8 THE COURT: All right. I will reluctantly grant that  
9 request, recognizing also that there are any number of  
10 plaintiffs here. And while you might be taking the lead, I'm  
11 sure some coordination of your arguments is necessary. So  
12 defendants will file their motion by May 25.

13 Yes.

14 MS. TARCZYNSKA: Your Honor, because the plaintiffs  
15 are getting three weeks on their opposition, we'd request more  
16 than just one week on the reply.

17 THE COURT: My, my, you're all very greedy.

18 I'll give plaintiffs until -- how about this: How  
19 about I give plaintiffs until June 13, which is not quite 21  
20 days but 19, and then defendants until June 22, which is nine  
21 days, for their reply? Is that OK for everyone?

22 MR. COLANGELO: Yes, Judge.

23 THE COURT: All right. In the meantime, again, the  
24 administrative record deadline I'll keep in place, June 8, but  
25 defer the filing of summary judgment motion until some later

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1 date after we reconvene to discuss the status of the record and  
2 the arguments that you'll be briefing in connection with the  
3 motions that we just discussed.

4 Give me one moment.

5 Would I be ruining anyone's vacation plans if I were  
6 to schedule oral argument on the morning of July 3?

7 MR. COLANGELO: No, your Honor.

8 MR. SHUMATE: I don't think so, your Honor.

9 THE COURT: All right. Sorry to hear that for all  
10 your sakes.

11 MS. TARCZYNSKA: Unfortunately, I believe I may be out  
12 of the office, but I think we can figure that out on our end.  
13 But because I will be away for two weeks, I don't want to delay  
14 everyone's resolution of this case by my vacation schedule.

15 THE COURT: All right. That's gracious of you. I  
16 appreciate it.

17 I will make sure that this schedule makes sense after  
18 I have a moment to reflect on it, but for now at least schedule  
19 oral argument for the morning of July 3 beginning at 9:30. And  
20 after I receive your briefing, if I have an opportunity, I may  
21 issue orders just addressing the structure of the oral  
22 argument, as well as any issues that I think you should focus  
23 on in connection with argument. At the same time, I will want  
24 to address the discovery-related issues that we began  
25 discussing today but with the benefit of at least your having

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1 seen the record.

2 So between June 8 and that date, you should meet and  
3 confer with respect to the record and any discovery that  
4 plaintiffs think is warranted. I would think that it would  
5 make sense for you to file, perhaps, separate letters in  
6 advance of the conference just addressing that issue as well so  
7 that I have some opportunity to think it through before that  
8 conference or argument.

9 So why don't we say about the -- if I said a week  
10 before, so I guess that's June 26, you would each file letters,  
11 let's say, not to exceed five pages, single spaced, does that  
12 seem appropriate?

13 MR. COLANGELO: Yes, Judge.

14 MS. TARCZYNSKA: Yes, your Honor.

15 THE COURT: All right. Anything else that you think  
16 we should discuss today?

17 MR. COLANGELO: Your Honor, I mentioned a minute ago  
18 that, in addition to the fact discovery we discussed, we did  
19 also want to make the Court aware that we think this is a case  
20 where some limited expert discovery may be appropriate. We  
21 will aim to include that as a subject of conversation when we  
22 meet and confer with counsel after seeing the administrative  
23 record, and we'll include that in what we file with the Court  
24 on June 26. But wanted to make sure that the Court was aware  
25 that we would raise that issue as well.

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1 THE COURT: All right. Just to give me a preview,  
2 what's the nature of that that you would anticipate?

3 MR. COLANGELO: One of the exceptions to the record  
4 rule is where there are issues that are either particularly  
5 complicated or where the evaluation of the facts would benefit  
6 from expert testimony. In this case, we think there are at  
7 least two issues where the administrative record is likely to  
8 be understood more easily with the assistance of experts to  
9 help explain some of the issues.

10 The first has to do with how the federal statistical  
11 system operates. The federal statistical system is its own  
12 creature. Statistical agencies like the Census Bureau are  
13 constrained, as we set out in our complaint, by a wide range of  
14 both statutory and regulatory requirements in addition to  
15 statistical directives from the Office of Management and  
16 Budget. And we think that in evaluating the administrative  
17 record, it will be useful for the Court and the parties to hear  
18 expert testimony on how and to what extent the Commerce  
19 Department deviated from those statistical norms and procedures  
20 in reaching its decision.

21 The second issue, at least initially, that we believe  
22 would benefit from some expert testimony has to do with  
23 establishing a vote dilution claim under the Section 2 of the  
24 Voting Rights Act. The United States' purported reason for  
25 adding this question to the census questionnaire is so that the

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1 Justice Department can better enforce the vote dilution  
2 standard under Section 2.

3 Nearly all vote dilution litigation is conducted with  
4 the assistance of expert witnesses who explain concepts like  
5 racially polarized voting. And we believe that, especially  
6 because the stated reason for the decision here is to produce  
7 better citizen voting-age population data in order to better  
8 litigate Section 2 cases, we think that expert testimony on how  
9 the vote dilution test is met in Section 2 cases would be  
10 useful to the Court. So that's a preview of the issues that we  
11 intend to raise.

12 THE COURT: All right. I'm inclined to say that  
13 there's no reason to discuss it further, now that you started  
14 by saying that it's something you would raise in connection  
15 with the record, and I'm not sure that we need to say anything  
16 further. But I will say that to the extent that you need to  
17 identify experts, I mean, without intimating a view on whether  
18 or not I would authorize that sort of discovery, I would  
19 certainly think you should be in a position on July 3 to move  
20 forward expeditiously so that if I did authorize it, you had  
21 them identified and could proceed with all deliberate speed, to  
22 use a loaded term.

23 So anything else to be discussed?

24 MS. TARCZYNSKA: Not for the government.

25 MR. COLANGELO: No, your Honor. Thank you.

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1 THE COURT: I think they're our government, too, just  
2 to be fair.

3 All right. I'll issue a scheduling order consistent  
4 with what we did today.

5 I thank the court reporter who did me a solid by  
6 showing up despite a late request on my part, and thank you all  
7 for being here.

8 We are adjourned.

9 (Adjourned)